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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	MM Docket No. 94-10
	)	
The Lutheran Church/	)	File Nos. BR-890929VC
Missouri Synod	)	BRH-890929VB
	)	
	)	
For Renewal of Licenses of	)	
Stations KFUO/KFUO-FM	)	
Clayton, Missouri	)	

MEMORANDUM OPINION AND ORDER

Adopted: January 28, 1997 : Released: January 31, 1997

By the Commission:

1. This memorandum opinion and order affirms, with modifications, the decision of the Review Board to renew the licenses of The Lutheran Church/Missouri Synod ("Church" or "licensee") for Stations KFUO(AM) and KFUO-FM. The Lutheran Church/Missouri Synod, 11 FCC Rcd 5275 (Rev. Bd. 1996).[1] The Board imposed reporting conditions on the renewals as a result of the Church's violation of the affirmative action provisions of 47 C.F.R. §73.2080, and a $50,000 forfeiture for misleading statements made in violation of 47 C.F.R. §73.1015. In addition, the Board granted the renewals for a short term ending January 1, 1997, one month earlier than the expiration of the current license term. We reduce the forfeiture to $25,000 and renew for a full term with reporting conditions.

I. INTRODUCTION

2. KFUO(AM) has been broadcasting since 1924. It is a daytime-only station operating noncommercially with a religious programming format. KFUO-FM went on the air in 1948 and is a full-time commercial station broadcasting classical music and some religious programming. The license term at issue for both stations ran from February 1, 1983 to February 1, 1990.

[1] In addition to denying the applications for review filed June 3, 1996 by the Church and the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St. Louis County Branch of the NAACP ("NAACP"), we also deny the NAACP's request for oral argument, filed June 18, 1996. Argument would not materially assist resolution of this proceeding.

II. BACKGROUND

3. This proceeding was initiated by Hearing Designation Order and Notice of Opportunity for Hearing for Forfeiture, 9 FCC Rcd 914 (1994) ("HDO"). Following a request for additional information from the licensee, the filing of a petition to deny by the NAACP, the issuance of four additional letters of inquiry, and the receipt of the licensee's responses, the Commission specified an issue to examine the licensee's compliance with the equal employment opportunity (EEO) requirements set forth in 47 C.F.R. §73.2080. Specifically, the Commission questioned the licensee's affirmative recruitment efforts and noted in particular that its reasons for failing to recruit -- among them, that it required "classical music expertise" and "Lutheran training" for certain positions -- were unacceptable because they had a direct adverse impact on the recruitment of Blacks. The bona fides of the classical music criterion were suspect, the Commission stated, because not all persons hired for the specified positions had such expertise and the licensee did not attempt to recruit minorities who did have this training. 9 FCC Rcd at 923. The Commission further stated that the licensee's representations in its renewal applications and in its responses to inquiries regarding the specifics of its EEO outreach efforts raised a question as to whether it misrepresented or lacked candor in providing information to the Commission concerning its recruitment and employment history and practices in violation of 47 C.F.R. §73.1015. Id. at 924-25.

4. In an Initial Decision, 10 FCC Rcd 9880 (ALJ 1995) ("I.D."), Administrative Law Judge Arthur I. Steinberg found, with respect to the EEO issue, that, although the stations did not discriminate against any person on the basis of race or color, they violated the Commission's EEO rules and policies by improperly giving preferential hiring treatment to individuals with knowledge of Lutheran doctrine and to active members of Lutheran congregations for positions which were not reasonably connected with espousal of the Church's religious views.[2] These hiring practices, the ALJ held, were contrary to the holding in King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir.), cert. denied, 419 U.S. 496 (1974) ("King's Garden"), which upheld the exemption of only those positions substantially connected with religious programming from the Commission's affirmative action rule. 10 FCC Rcd at 9907-08 ¶¶194-5; id. at 9908-09 ¶¶200-01. He further concluded that, for the first four and a half years of its license term (February 1, 1983 to August 3, 1987), the Church's overall affirmative action efforts were flawed but acceptable, id. at 9909-11 ¶¶205-12, whereas, for the remainder of the license term (August 3, 1987 to February 1, 1990), its efforts were unsatisfactory and not in substantial compliance with

[2]The Church believed during the license term that many of the positions at KFUO(AM), as well as positions that served functions at both stations, required knowledge of Lutheran doctrine. 10 FCC Rcd at 9886 ¶50.

47 C.F.R. §73.2080.[3] Id. at 9911-12 ¶¶213-22. The ALJ held that these deficiencies were sufficiently serious as to warrant the imposition of EEO reporting conditions, but not severe enough to warrant non-renewal. Id. at 9916-17 ¶¶253-56. With regard to the misrepresentation/lack of candor issue, the ALJ concluded that the Church lacked candor, first, in describing the stations' minority recruitment program in its 1989 renewal applications (id. at 9913-14 ¶¶230-38) and, second, in informing the Commission that knowledge of classical music was a requirement for the position of salesperson at the FM station. Id. at 9915-16 ¶¶246-51. The ALJ further held that because the misconduct was largely the product of the actions of one individual without the involvement of top management officials, including the President of the Church and the CEO of the stations, and because the licensee had an overall exemplary record of compliance for many years, non-renewal was not called for. Accordingly, the ALJ imposed a forfeiture of $50,000 for willful and repeated violation of 47 C.F.R. §73.1015. Id. at 9918 ¶¶259-61.

5. The Board concluded that the I.D. was fully supported by the record and Commission precedent. 11 FCC Rcd at 5275 ¶1. On the EEO issue, the Board agreed that reporting conditions were appropriate because of the licensee's noncompliance with the Commission's EEO requirements during the latter part of the license term, and for its preferential hiring treatment afforded Lutherans for the positions of receptionist, secretary, engineer, and business manager, positions not reasonably connected with the espousal of the Church's religious views. Id. at 5280-81 ¶¶28-29, 33. Adopting the ALJ's undisputed factual findings, the Board concluded that, with the exception of Thomas M. Lauher during his tenure as general manager of the FM station from May 1987 to July 1989, no management employee made any attempt to implement a consistent EEO program at the stations. Thus, the Board found that neither the Reverend Paul Devantier, the Executive Director of the Church's Board for Communications Services, CEO of the stations, and acting general manager of the FM station, nor Dennis Stortz,

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[3]The ALJ divided his analysis of the license term in order to take account of changes in Commission policy. That is, until August 3, 1987, the Commission's processing standards were result-oriented and focused on the number of minority hires. Stations were subject to program review if their overall minority and female representation was less than 50% of parity. See EEO Processing Guidelines for Broadcast Renewal Applicants, 46 RR 2d 1693 (1980), recon. denied, 79 FCC 2d 922 (1980). Effective August 3, 1987, the Commission amended its rules and de-emphasized the use of statistics to evaluate a licensee's EEO program in favor of examining the licensee's overall efforts to operate in a nondiscriminatory manner. See Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services, 2 FCC Rcd 3967 (1987), petition for recon. pending. The Commission now focuses on the station's EEO program, its efforts to contact sources likely to refer qualified minority and female applicants, and its self-analysis of its outreach program. Streamlining Broadcast EEO Rule and Policies (Order and Notice of Proposed Rule-Making), 11 FCC Rcd 5154, 5158 (1996).

the Operations Manager for the stations from 1978 to 1991 and acting general manager for the stations from July 1986 to May 1987, took steps to carry out the EEO program, even though Stortz, who was in charge of day-to-day operations, had been informed by counsel of the Commission's EEO requirements and the need to carefully review the stations' EEO efforts, and had received memoranda from Lauher pointing out the stations' deficiencies; that, until corrected by Lauher, the employment application in use at the time gave no notice of the stations' EEO policies, did not state that discrimination was prohibited, and did state that preference could be given to Lutherans; that the licensee's efforts to solicit the assistance of likely sources of qualified minority applicants were irregular and generally unsuccessful, e.g., on one occasion, in July 1989, Lauher sent letters to university and personnel agency sources indicating a general interest in minority referrals but the letters did not mention specific openings and these sources were not subsequently contacted when positions were filled; that the stations did not evaluate their employment profile and job turnover against the availability of minorities and females in their recruitment area; and that, following Lauher's departure, there was no continuing review of the stations' job structure or analysis of their efforts to recruit and hire minorities. Id. at 5277 ¶13, 5280 ¶30.

6. A much more serious matter, the Board held, was the licensee's lack of candor regarding its EEO program. Id. at 5280 ¶31. Specifically, the Board agreed with the ALJ that the following statement by the licensee describing its recruitment program in its renewal applications was grossly misleading:

> When vacancies occur, it is the policy of KFUO and KFUO-FM to seek out qualified minority and female applicants. We deal only with employment services, including state employment agencies, which refer job candidates without regard to their race, color, religion, national origin or sex. We contact the various employment services and actively seek female and minority referrals and we specifically request them to provide us with qualified female and minority referrals. See sample reply form attached.

The Board found that, instead of responding specifically in the renewal applications to the questions on FCC Form 396 pertaining to the licensee's hiring practices, the licensee, under Stortz's supervision, substituted its own narrative statement which conveyed the impression that the stations had adopted a model EEO program whereas the record established that the licensee's program had fallen into noncompliance. Id. at 5278-79 ¶¶20-24. The Board, however, declined to resolve the second instance of lack of candor found by the ALJ involving the licensee's response that knowledge of classical music was a requirement for sales positions at the FM station, concluding that the lack of candor it affirmed was sufficiently serious to justify the ALJ's imposition of a $50,000 forfeiture. Id. at 5279-80 ¶¶25-27. Noting the ALJ's finding that the licensee's witnesses, including Stortz, the individual responsible for the day-to-day operation of the stations and the person to whom the misconduct was largely attributable, testified truthfully and could be expected to deal candidly with the Commission in the future,

the Board concluded that denial of renewal would not be appropriate. Id. at 5280-81 ¶31. Finally, the Board stated that the Commission has issued short-term renewals in cases involving similar EEO rule violations, and that it would impose a comparable sanction here. Id. at 5281 ¶34.

7. The Church argues that the decisions below holding it did not comply with the Commission's EEO requirements violate its constitutional right to religious freedom. It contends that the I.D. improperly evaluated its recruitment efforts and employment criteria in light of whether particular jobs were reasonably connected to the espousal of the Church's views. It states that the Church had the right to give preference to Lutherans for all positions in accordance with Section 702 of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1(a). Insofar as the ALJ relied on King's Garden, in holding to the contrary, the Church submits, that decision has been overruled by Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) ("Amos"). The decisions below also violate the First and Fifth Amendments, the Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb-1, and Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097 (1995) ("Adarand"), the Church maintains, because they substantially burden the free exercise of religion without a compelling justification. The Church also disputes the Board's lack of candor finding and states that the description of its EEO policies in the renewal applications was generally accurate at the time the applications were filed. Moreover, the Church claims, there is no evidence that Stortz, who supervised the preparation of the EEO statement, had the requisite intent to mislead. Finally, the Church argues that the forfeiture assessed by the Board was excessive and that, in any case, the Commission lacked statutory authority in the HDO under 47 U.S.C. §503(b) to impose a fine for activity that occurred more than three years earlier.

8. The NAACP argues broadly that, as a result of the ALJ's procedural and evidentiary rulings, the hearing was hopelessly one-sided and unfairly favored the licensee. It maintains that the ALJ did not understand the nature of discrimination, was incapable of fairly trying a civil rights case, and that his mishandling of the proceeding requires remand to a different ALJ if the case is not otherwise reversed. Moreover, it contends that the ALJ improperly reversed the HDO's finding that the licensee's EEO policies were inherently discriminatory and that he disregarded numerous additional misrepresentations by the licensee. The NAACP concludes that the penalty for the discrimination and misrepresentations shown on this record must be nonrenewal. The Mass Media Bureau simply urges that the decisions below should be affirmed.

III. DISCUSSION

A. EEO Issue.

1. Responses to the Church's Arguments

9. We turn first to the Church's constitutional arguments. It contends principally that

the court's holding in King's Garden, relied on in the HDO and the I.D., is no longer good law.[4] That case upheld the Commission's policy limiting its exemption of religious broadcasters from the EEO rules to those individuals hired to espouse religious views over the air. See Complaint by Anderson, 34 F.C.C. 2d 937, 938 (1972), aff'd sub nom. King's Garden, Inc., 38 F.C.C. 2d 339 (1972); accord, National Religious Broadcasters, Inc., 43 F.C.C. 2d 451 (1973). "Where a job position has no substantial connection with program content, or where the connection is with a program having no religious dimension," the court held, enforcement of the Commission's EEO rules does not violate a licensee's First Amendment right to freedom of religious expression. King's Garden, 498 F.2d at 61. The court rejected the contention that the Commission's limited exemption for religious broadcasters is inconsistent with the 1972 amendment to Section 702 of the Civil Rights Act of 1964, which exempted all "activities" of religious organizations from the ban on religious discrimination in employment contained in Title VII of that law. (Prior to 1972, the exemption covered only "religious activities.") The Commission's EEO rules, the court found, were independently promulgated under the public interest standard of the Communications Act, and Congress did not indicate an intent in 1972 that the broader exemption in the Civil Rights Act should be engrafted onto the Commission's rules. Id. at 53-54, 57.

10. We do not agree with the Church that Amos has effectively overturned King's Garden. Amos, which was not a broadcast case and did not discuss or review the Commission's EEO requirements,[5] upheld the constitutionality under the First Amendment of the broad exemption for religious institutions enacted in Section 702 "as applied to the nonprofit activities of religious employers." 483 U.S. at 339. The Court held that the Section 702 exemption, which was intended to alleviate significant government interference with the ability of religious institutions to define and carry out their missions, did not violate the Establishment Clause. Id.

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[4]Curiously, at the pre-designation stage, the Church initially invoked King's Garden in its defense, much to the later consternation of the Board. See Oral Arg. Tr. 1135; 11 FCC Rcd at 5281 ¶¶ 35, 37; id. at 5282 (Additional Views of Board Chairman). Despite its misgivings in this regard, the Board did not resolve the constitutional issue because it deemed the matter to be outside its jurisdiction. See Frank H. Yemm, 39 RR 2d 1657 (1977). We share the Board's concern about the Church's change of position. Nevertheless, in view of the seriousness we accord any constitutional challenge, we will deal with the Church's argument in its current form.

[5]In NAACP v. Federal Power Commission, 425 U.S. 662 (1976), the Supreme Court endorsed the Commission's jurisdiction to adopt its EEO rule by favorably contrasting it to a Federal Power Commission rule which exceeded that agency's statutory mandate. The Court stated that the Commission's EEO rule "can be justified as necessary to enable the FCC to satisfy its obligation under the Communications Act . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." 425 U.S. at 670 n.7. Nothing in Amos contradicts this observation.

at 335-6. King's Garden expressed serious doubt as to the constitutionality under the Establishment Clause of the 1972 Section 702 exemption, 498 F.2d at 56-7, and Amos laid to rest any such concerns. Nevertheless, King's Garden based its conclusion upholding the Commission's policy on an independent ground, namely, that the broader exemption of all activities of religious organizations in Section 702 was simply not relevant to the Commission's regulation of the EEO practices of broadcast licensees under the public interest standard of the Communications Act. 498 F.2d at 58. Had Congress exempted religious organizations from the Commission's public interest requirements in 1972, or if the Commission independently promulgated such an exemption, Amos indicates that such an exemption would be constitutional. But Congress has not enacted such an exemption and the Commission has not itself adopted such an exemption. Since the Commission's EEO policies are not founded on the Civil Rights Act, there is nothing in Amos that supports a conclusion that the Commission's lack of a comparable exemption in its EEO rules and cases is unconstitutional.

11. As in King's Garden, the courts have consistently recognized the distinction between the Commission's EEO requirements and Title VII of the Civil Rights Act. See Florida State Conference of NAACP v. FCC, 24 F.3d 271, 274 n. 4 (D.C. Cir. 1994) (statistical analysis employed in Title VII cases is irrelevant in determining compliance with EEO rule); Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 628 (D.C. Cir. 1978) ("[T]he FCC is not the Equal Employment Opportunity Commission, and a license renewal proceeding is not a Title VII suit.") As we have stated, "[t]he EEO rule is not intended to replicate federal and state antidiscrimination laws but rather to advance the Commission's unique program diversity-related mandate." Streamlining Broadcast EEO Rule and Policies (Order and Notice of Proposed Rule-Making), 11 FCC Rcd 5154, 5158 (1996); accord, Implementation of Commission's Equal Employment Opportunity Rules (Notice of Inquiry), 9 FCC Rcd 2047 (1994); see also San Mountain Broadcasting, Inc., 9 FCC Rcd 2124, 2126 n. 11 (1994). Indeed, the Church concedes as much when it contends that, if this were a Title VII suit, it would clearly be covered by the Section 702 exemption, immediately after asserting that a license renewal proceeding, such as this one, is not a Title VII suit. (Opposition to NAACP's Application for Review at 9 n. 8.) Additionally, insofar as the Church argues that Amos overturned King's Garden by holding that the government may not interfere in job determinations without "chilling" religious freedom (Application for Review at 4 n. 6), we are unpersuaded by this argument in light of the Supreme Court's statement that it had no occasion to pass on the argument that the Section 702 exemption is required by the Free Exercise Clause. 483 U.S. at 339 n. 17. As noted, King's Garden found no conflict between the Commission's limited EEO exemption and the Free Exercise Clause, whereas Amos found no conflict between the broader Section 702 exemption and the Estabishment Clause.

12. Thus, the teaching of King's Garden remains valid and applies to the licensee in this case:

> A religious group, like any other, may buy and operate a licensed radio or

> television station . . . . But, like any other group, a religious sect takes its franchise "burdened by enforceable public obligations."
>
> * * *
>
> [A religious group] confronts the FCC's rules only because the sect has sought out the temporary privilege of holding a broadcasting license, [which is] "a limited and valuable part of the public domain."

498 F.2d at 60 (citations omitted).

See also Scott v. Rosenberg, 702 F.2d 1263, 1272 (9th Cir. 1983) ("The FCC grants licenses and regulates the public airwaves without differentiating between religious and secular broadcasters"), cert. denied, 465 U.S. 1078 (1984). Finally, we point out that, because Amos literally applies only to the "nonprofit activities" of religious employers, and the record here establishes that KFUO-FM operated commercially beginning in July 1983 and for the remainder of the license term in issue, Amos would not appear to insulate that station's hiring practices in any case.

13. The Church's Fifth Amendment argument is premised on the holding in Adarand, but we find that this case too is unsupportive of the Church's position. In Adarand, the Supreme Court held that where there may be a violation of the personal right to equal protection of the laws as the result of a race-based preference program under federal law, courts must employ strict scrutiny to determine whether a racial classification is narrowly tailored to further a compelling government interest. 115 S. Ct. at 2113. Contrary to the Church's position, our EEO rule does not use racial classifications, nor does it require that any person be hired or be given a hiring preference based on race. Rather, it requires that licensees make efforts to recruit minority and women applicants so that they will be assured access to the hiring process. Thus, the EEO rule, applied to the Church here, does not result in the deprivation of a constitutional right on the basis of race, and the Church has not even identified any person who arguably suffered any such injury. See Benchmark Radio Acquisition Fund IV Limited Partnership, 11 FCC Rcd 8547, 8548-50 ¶¶3-5 (1996); Tidewater Communications, Inc., 11 FCC Rcd 7814, 7814-16 ¶¶3-8 (1996); Streamlining Broadcast EEO Rule and Policies, 11 FCC Rcd at 5161-62 ¶¶13-15.[6]

14. The Church's subsidiary reliance on enactment of the Religious Freedom Restoration Act ("RFRA") is also unpersuasive. The RFRA states that the government may not

[6]Nor has the Church substantiated its bald assertion (Application for Review at 6 n. 9) that "invasive questions" at the hearing caused it to discontinue its on-air internship program for seminary students.

"substantially burden" the free exercise of religion absent a compelling interest. The Church acknowledges that the RFRA codified the holding in Sherbert v. Verner, 374 U.S. 398 (1963), an unemployment compensation case which pre-dated King's Garden. It thus does not provide support for the Church's contention that later legal developments invalidated the King's Garden rationale. More importantly, we do not believe it is a substantial burden on a religious entity that holds broadcast stations to comply with the Commission's EEO rules for those employees not involved with espousing its religious views over the air. "Cases abound in which the First Amendment right to free exercise of religion has been held to not be absolute, and indirect and incidental burdens thereon were found to be constitutionally proper. See, e.g., . . . King's Garden . . . ." Coomes v. Commissioner of Internal Revenue, 572 F.2d 554 (6th Cir. 1978). And, contrary to the Church's allegation (Opposition to NAACP's Application for Review, at 6), there is certainly nothing in Amos which indicates that the Commission's policy constitutes an improper burden on the Church under the RFRA. Finally, the Church states that the National Religious Broadcasters ("NRB") has raised in the pending Streamlining Broadcast EEO Rule and Policies rule-making proceeding "the same concerns the Church has raised in this case" and has asked the Commission to modify its EEO rule to permit religious organizations to establish religious belief as a qualification for all station employees. In addition, the Church has cited the NRB's comments in the EEO rulemaking in support of its arguments about King's Garden and Section 702. The NRB's specific contentions, however, which remain under consideration in the rulemaking proceeding,[7] have no bearing on the question of the Church's compliance with the current EEO rule. In sum, we perceive no constitutional or other basis for declining to apply our EEO requirements to the licensee before us.

2. Responses to the NAACP's Arguments

15. In addressing the NAACP's contentions, we point out initially that its pleading is largely directed at the I.D. and reiterates the arguments in its Exceptions to the Board. Moreover, its application contains twenty-eight single-spaced footnotes, including one with eleven subparts. We will deal only with its principal contentions without repeating the analysis of the Board with which we substantially agree. See Capitol Radiotelephone, Inc., 11 FCC Rcd 8232 (1996) (Commission limits consideration of arguments where applicant did not concisely and plainly state the questions for review as required by 47 C.F.R. §1.115(b)).

16. First, we reject the NAACP's assertion that the ALJ's hearing rulings demonstrated "a curious neutrality-in-favor-of-the-licensee," Office of Communication of the United Church of Christ v. FCC, 425 F.2d 543, 547 (D.C. Cir. 1969), requiring his removal should there be a need for further hearing. The NAACP never sought the ALJ's disqualification for bias and

[7]The Commission's view that Adarand does not implicate our EEO program is also a subject of the rulemaking proceeding referred to in the text. See Streamlining Broadcast EEO Rule and Policies, 11 FCC Rcd at 5161-62 ¶¶13-15.

it is too late to do so now. See 47 C.F.R. §1.245(b); Aspen FM, Inc., 5 FCC Rcd 3196 (Rev. Bd. 1990), rev. denied, 6 FCC Rcd 1602 (1991). An ALJ's adverse rulings do not, in and of themselves, establish a lack of neutrality, see WWOR-TV, Inc, 5 FCC Rcd 2845 (1990), and, here, the ALJ's evidentiary rulings were well-supported. For example, the NAACP complains that the ALJ rejected certain of its hearing exhibits containing expert testimony, but the ALJ properly based his rulings on grounds of competency, relevance, and the failure of the proffered testimony to rebut anything in the Church's direct case. Tr. 350-59, 399. Similarly, the NAACP objects to the rejection of the testimony of a former station employee, but the ALJ grounded his ruling on the fact that the evidence was untimely offered on the last day of the hearing without adequate justification. Tr. 1081-85. In addition, although the NAACP complains about the ALJ's rulings on document production, in fact, extensive document production -- some 4,000 pages -- was permitted and the ALJ's rulings were well-reasoned. See FCC 94M-282, released April 21, 1994; FCC 94M-311, released May 2, 1994. Finally, the ALJ thoroughly examined and properly rejected the NAACP's assertion that the Church had wrongly obtained access to its attorney work product and trial strategy. See 10 FCC Rcd at 9918-9920 ¶¶263-272. We affirm the Board's conclusion that, notwithstanding the NAACP's allegations of erroneous procedural and evidentiary rulings, the ALJ did not abuse his discretion or commit reversible error in conducting the hearing. See 11 FCC Rcd at 5281 ¶32.

17. We also disagree with the NAACP's contention that the ALJ misunderstood or overlooked discrimination in this case. First, the ALJ was precluded from making a finding of discrimination since there is no evidence in the record that the licensee discriminated against any minority member, nor is there evidence that any person complained of discriminatory hiring practices by the licensee. Compare Applications of Certain Television Stations Serving Communities in the State of California, 6 FCC Rcd 2340, 2343 (1991) (no basis for finding licensee engaged in discriminatory religious employment practices where no one claimed to be adversely affected by the station's employment practices and no EEO complaints were filed during the license term), with Catoctin Broadcasting Corp., 4 FCC Rcd 2553, 2556 (1989) (licensee discriminated against Black applicant for secretarial position in initially refraining from even considering her for employment because of her race). Moreover, the statistical record does not raise an inference of such discrimination. During the license term, the stations' staff averaged twenty full-time employees. The stations made forty-three full-time hires, seven of which were minorities. Overall, 16.3% of full-time hires were minorities. Excluding those hires made after January 2, 1990, the date the NAACP filed its petition to deny, approximately 12% of the full-time hires were minorities. Although the NAACP contends that the minority hires were for lower level positions, thereby evidencing a discriminatory intent, in fact, of the five minority hires made prior to the filing of the NAACP's petition, one Hispanic, Caridad Perez, was hired for a Top Four category job position. Also, Lula Daniels, a Black, was promoted from a secretarial position to a Top Four position, in which she served until her death; and another Black employee, Ruth Clerkly, was recommended and considered for a management position, but left the licensee's employ before she could be promoted. In this regard, although the licensee's efforts to recruit from likely sources of minority applicants were sporadic, Ms.

Daniels acted as part of a network of Lutherans in the community who by word of mouth identified other likely candidates for employment, and she successfully referred two of the minority individuals hired by the stations. As the ALJ observed, it is unlikely any of these individuals would have been employed if the Church was bent on racial discrimination. See Act III Broadcasting, 11 FCC Rcd 1172, 1173 ¶7 (1995) (no employment discrimination found where, despite deficiencies in recruitment, record-keeping, and self-assessment, licensee consistently hired minorities).

18. Finally, we reject the NAACP's assertion that the ALJ improperly departed from a "core preliminary finding" by the Commission in the HDO that the licensee's reasons for its recruitment practices at KFUO-FM were inherently discriminatory. The licensee had defended its failure to recruit by maintaining that its classical music format necessitated the hiring of sales people with classical music expertise and that its small Black listening audience meant there were few Blacks in the service area who had this training. Although, as the HDO found, this was an unacceptable premise for failing to actively recruit minorities, the hearing record does not support the inference the NAACP seeks to draw that the licensee's policies were therefore discriminatory. First of all, the classical music requirement was not created by the licensee as a pretext to excuse White hiring, but was originally the idea of Peter Cleary, the founder of a sales representative firm hired by KFUO-FM to act as its sales staff during the early years of the license term, who advised the licensee that this experience was a desirable job qualification. Moreover, there is no evidence that any minority applicant was turned down or discouraged from applying because of a lack of such training. 11 FCC Rcd at 5277 ¶14. Furthermore, we agree with the authorities below that the licensee's mere presentation of its pre-designation defense was not, in and of itself and without the development of substantiating record evidence, sufficient to support a conclusion that KFUO-FM intended to discriminate. See Pasco Pinellas Broadcasting Co., 8 FCC Rcd 398, 399 (1993), aff'd sub nom. Florida State Conference of NAACP v. FCC, 24 F.3d 271 (D.C. Cir. 1994) (licensee's argument in response to alleged inference of discrimination is not indicative of discriminatory intent). Accordingly, the NAACP's contention that the record establishes that the licensee practiced discrimination is rejected.

B. Misrepresentation/Lack of Candor Issue.

19. We agree with the ALJ and the Board that the licensee's composite description of its recruitment program submitted in its renewal applications was seriously misleading. The statement, volunteered by the licensee, and not made in response to specific questions in FCC Form 396, created a false impression that the licensee's program fully comported with Commission requirements. In fact, the licensee's EEO recruitment program had fallen into noncompliance. See ¶¶5-6, supra. The licensee maintains that its narrative description of its EEO program was substantially true at the time it was made because it reflected the stations' practice when the renewal applications were filed. This is not an acceptable justification for submitting misleading and incomplete information to the Commission. The essence of lack of

candor is concealment, evasion, or other failure to be fully informative. Fox River Broadcasting, Inc., 93 F.C.C. 2d 127, 129 (1983). The duty of candor requires applicants to be fully forthcoming as to all facts and information that may be decisionally significant to their applications. Swan Creek Communications v. FCC, 39 F.3d 1217, 1222 (D.C. Cir. 1994); RKO General, Inc. v. FCC, 670 F.2d 215, 229 (D.C. Cir. 1981), cert. denied, 456 U.S. 927 and 457 U.S. 1119 (1982). Broadcasters are held to "high standards of punctilio" and must be "scrupulous in providing complete and meaningful information" to the Commission. Lorain Journal Co. v. FCC, 351 F.2d 824, 830 (D.C. Cir. 1965).

20. We also disagree with the Church that the record is devoid of evidence of any intent to deceive. Such an intent is essential to a finding of lack of candor. Fox Television Stations, Inc., 10 FCC Rcd 8452, 8478 (1995), recon. denied, 11 FCC Rcd 7773 (1996). In this case, Stortz, who was Operations Manager for the stations throughout the license term, general manager of the stations for about a year, and the individual responsible for EEO matters after Lauher's departure, was familiar with the licensee's hiring practices and had to know that its statement in the renewal applications describing its EEO program was not fully reflective of the facts. In view of this knowledge, we agree with the ALJ and the Board that a conclusion is warranted that Stortz and the licensee wished not to provide the Commission with a detailed and accurate picture of the stations' EEO efforts because of the likelihood that serious questions would be raised about their renewal applications. See Black Television Workshop, 8 FCC Rcd 4192, 4198 n. 41 (1993) (subsequent history omitted) ("Intent is a factual question that can be inferred if other evidence shows that a motive or logical desire to deceive exists, as is the case here."). At the very least, as was concluded below, the record establishes an indifference and wanton disregard for the accuracy of the licensee's EEO representations that is "equivalent to an affirmative and deliberate intent." RKO General, Inc. v. FCC, 670 F.2d at 225, quoting Golden Broadcasting Systems, Inc., 68 FCC 2d 1099, 1106 (1978).

21. Lastly, we will reinstate the ALJ's lack of candor finding pertaining to the classical music requirement at the FM station, which the Board declined to resolve. Id. at 9915-16 ¶¶246-49. We reach this issue because the ALJ considered the matter serious enough to provide a basis for imposition of a substantial forfeiture, and whereas the Board ultimately affirmed the full amount of the forfeiture imposed by the ALJ for lack of candor, it did so because it believed the misleading description of the Church's recruitment efforts in the renewal applications was in itself sufficient to warrant this sanction. Twice, in pre-designation pleadings, the licensee represented that knowledge of classical music was a "requirement" for the position of salesperson at KFUO-FM. See Opposition to NAACP Petition to Deny, filed February 23, 1990; Motion to Strike and Reply to Comments, filed September 21, 1992. The Opposition was reviewed by Stortz and supported by his affidavit. The language in the Opposition was drafted after a series of oral and written communications between Stortz and counsel, during which counsel had inquired whether there were any positions at the stations requiring specialized skills or background. Stortz had replied that there were. In a memorandum to counsel, he stated: "KFUO-FM's format is 'Classical,' with many of its positions requiring a knowledge of classical

music . . . ." Counsel used the representation concerning specialized skills in arguing that the Commission should not rely on general labor force statistics in evaluating the licensee's EEO program, but should consider instead the licensee's showing that few minorities in the area possessed the requisite background. See ¶¶3, 18, supra. The record established, however, that classical music knowledge, though highly desirable, was not a requirement for salespersons at KFUO-FM; that only eight of the fifteen individuals employed in sales positions at the station during the license term actually had some classical music background or experience; and that, toward the end of the license term, station management began to believe that general sales experience was equally valuable. 10 FCC Rcd at 9900, 9901 ¶¶136, 145. Stortz stated that the licensee did not intend to mislead the Commission by its representation concerning the hiring "requirement," but that, as a non-lawyer, he was "not accustomed to providing the level of detail and precision" with which attorneys are familiar. Id. at 9916 ¶249. Although it did not finally resolve the matter, the Board acknowledged the "black-letter law" that an applicant's misleading statements may not be shielded by its reliance on advice of counsel, Hillerand Broadcasting, Inc., 1 FCC Rcd 419 (1986); James C. Sliger, 70 FCC 2d 1565, 1572-73 (Rev. Bd. 1979), but stated, citing Fox Television Stations, Inc., 10 FCC Rcd at 8501 ¶119 n. 68, that because the "critical word" was contained in a legal argument crafted by counsel, a layman may not have fully appreciated its importance. 11 FCC Rcd at 5280 ¶27.

22. From the beginning of this proceeding, the Commission has been concerned with the licensee's representation that it restricted its recruitment efforts at KFUO-FM because of its classical music criterion. See 9 FCC Rcd at 922, 923 ¶¶25, 30. Stortz, as previously explained, was familiar with the stations' EEO activities and hiring practices. He knew that classical music knowledge was not a prerequisite at KFUO-FM and that only half of the persons hired for sales positions had such experience. Yet he acquiesced in the filing of misleading information with the Commission. Once again, the record shows that Stortz was motivated by his knowledge of the licensee's inadequate recruitment efforts and, in this instance, by the specific desire to justify the deficient practices at the FM station. We cannot agree with the Board that the issue may be merely the misuse of a single critical word since the licensee's Opposition also stated that the sales positions "can only be filled" by persons with expertise in classical music and that certain employees "must have" specialized skills. 10 FCC Rcd at 9902 ¶152. Nor can we accept the Board's view that Stortz's lay status or reliance on counsel negated any intent to mislead. What was involved here was not the use of formal legal terms which required the understanding of legal concepts. Thus, this case is unlike Fox Television Stations, Inc., where the foreign ownership question involved a technical issue in a complex area of law, making reliance on counsel particularly appropriate, see 10 FCC Rcd at 8500. Rather, at issue here were commonly understood words which Stortz himself had used. Moreover, Stortz was not unsophisticated in his understanding of the careful use of words. Thus, he testified that it was not misleading for the licensee to represent in its renewal applications that its policy was to recruit "qualified minority and female applicants," without also revealing that the stations had certain job qualifications, such as theological and classical music training, because the use of the adjective "qualified" was consistent with the stations' use of these job criteria. 10 FCC Rcd at

9888 ¶¶64. In sum, it must be concluded that, here, too, the licensee, through Stortz, was lacking in candor. Cf. Voice of Reason, Inc., 37 FCC 2d 686, 692 ¶15 (Rev. Bd. 1972), recon. denied, 39 FCC 2d 847 (Rev. Bd. 1973) (principal's claimed innocence inconsistent with his sophistication as a businessman).[8]

IV. SANCTIONS

23. We will affirm the decisions below granting the Church's license renewal applications subject to reporting conditions as a consequence of the EEO infractions demonstrated on this record. The imposition of reporting conditions is supported by Commission action in comparable cases, see, e.g., Radio Seaway, Inc., 7 FCC Rcd 5965, 5968 (1992) (reporting conditions imposed where licensee failed to contact outside referral sources for 20 of 31 full-time positions and did not begin affirmative recruitment for job vacancies until the reporting year); Stations WPNT(AM)/WPNT-FM, 6 FCC Rcd 7246 (1991) (reporting conditions imposed where licensee failed to affirmatively recruit for 29 of 39 positions and relied instead on resumes on file and employee referrals); Winfax, Inc., 5 FCC Rcd 4902, 4902-03 (1990) (reporting conditions imposed on licensee with specialized format which employed minorities but did not use recruitment sources likely to produce qualified minorities until shortly before it filed its renewal application, and did not engage in self-assessment). Reporting conditions are also warranted in this case because, despite receiving advice during the license term from counsel and Lauher, the former general manager of the FM station, regarding the seriousness of the Commission's requirements, the licensee did not comply with the Commission's EEO rule. Thus, a formal mechanism to monitor compliance is appropriate. Although the Church would limit its obligation to a single report on how it will comply with the King's Garden guidelines in the future (Opposition to NAACP's Application for Review at 6), we believe the Church's recruitment deficiencies mandate a broader reporting requirement. Accordingly, the Church will be required to submit reports annually over a three year period and, inter alia, to list all persons hired as well as all persons who applied for each position filled, including their recruitment

[8]We do not agree with the NAACP, however, that the ALJ erred by ignoring as many as seventy-one additional misrepresentations made by the licensee. (The Board did not address this point.) Nor is it necessary, as the NAACP urges (Application for Review at 3 n. 8), for us to review the record to determine "the most palpable ones." As the ALJ found, all of these alleged false statements, many of which appear to involve insignificant semantical disputes or to be cumulative or de minimis, were raised for the first time in the NAACP's Proposed Findings of Fact and Conclusions of Law. The NAACP did not cross-examine on these matters and the licensee was afforded no opportunity to respond to them. Moreover, they do not involve the kind of candorless testimony or glaring behavior in the face of the tribunal which may be explored in the absence of a specific issue. See RKO General, Inc. v. FCC, 670 F.2d at 234-6. In these circumstances, we affirm the ALJ's ruling that it would be patently unfair to draw adverse conclusions on any of these matters. See 10 FCC Rcd at 9912 ¶223 n. 23.

sources, job titles, and sex and race; to list all current employees by job title, sex and race; and to describe in detail the stations' efforts to recruit minorities for each position filled, including the identification of sources used, and indicating whether any of the applicants declined offers of employment.[9] This will ensure that the Church implements an EEO program in the future that fully comports with Commission requirements, and will allow the Commission to periodically review the Church's efforts. See, e.g., Radio Seaway, Inc., 7 FCC Rcd at 5970.

24. On the other hand, we do not believe that denial of license renewal is warranted in this case. Although the NAACP relies on the proposition that "intentional discrimination almost invariably would disqualify a broadcaster from a position of public trusteeship," citing Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC, 595 F.2d 621, 629 (D.C. Cir. 1978), we have no occasion to apply this principle here because there is simply no evidence in the record of intentional discrimination against any person. Moreover, a review of recent Commission precedent reveals no instances where non-renewal was imposed for EEO infractions similar to those disclosed in this proceeding. See 10 FCC Rcd at 9917 ¶256 and cases cited therein. We also find it unnecessary to impose a short-term renewal in this case and will delete the Board's action to this effect. In the context of the stations' existing licenses, the Board's action would have reduced the full term by only one month, which would be too brief a period to have any meaningful impact as a sanction.

25. The two episodes of lack of candor, involving the licensee's description of its recruitment program in its renewal applications, and its statements informing the Commission that classical music knowledge was a requirement for sales positions at KFUO-FM, normally would fully warrant the imposition of the substantial forfeiture assessed by the ALJ and the Board. For the reasons stated here which relate to the relevant statute of limitations, however, we will reduce the $50,000 amount assessed below to $25,000. Non-renewal, on the other hand, as urged by the NAACP, is not called for. In determining the weight to be accorded specific acts of misconduct, the Commission considers the willfulness, frequency, and currentness of the behavior, as well as its seriousness, the participation of station owners and managers, and other relevant factors. Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1227-1228 (1986) (subsequent history omitted) ("Character Policy Statement"). Though the misconduct here was serious, willful, and repeated, the submission of the misleading statements was largely due to the actions of one individual, Stortz. Although Stortz was not disciplined for his actions, there is no evidence of involvement or prior knowledge on the part of higher station officials. See The Petroleum v. Nasby Corp., 10 FCC Rcd 6029 (Rev. Bd. 1995), recon. granted in part, 10 FCC Rcd 9964, remanded on other grounds, 11 FCC Rcd 3494 (1996) (non-renewal not required where other station officials were

[9]Of course, positions exempted under King's Garden because they involve the espousal of religious views over the air would require no recruitment, and the Church should indicate in its reports any positions for which it engaged in no recruitment efforts.

not involved in or aware of individual principal's wrongdoing); accord, Mid-Florida Television Corp., 69 FCC 2d 607, 653 (Rev. Bd. 1978), set aside on settlement, 87 FCC 2d 203 (1981). Indeed, the stations' CEO, Reverend Devantier, was found by the ALJ to be genuinely contrite and embarrassed by the misconduct shown in the record. See 10 FCC Rcd at 9918 ¶259. In addition, there is no evidence that during the Church's long history as a Commission licensee that it has ever engaged in, or even been accused of, any other acts in violation of the Commission's rules or policies. See Character Policy Statement, 102 FCC 2d at 1228 (applicant's record of compliance with rules and policies should be taken into account). The Commission has a range of sanctions short of non-renewal and only the most egregious cases result in termination of all rights. Id.; KQED, Inc., 3 FCC Rcd 2821, 2828-2829 (Rev. Bd. 1988), and cases cited therein, rev. denied, 5 FCC Rcd 1784 (1990), recon. denied, 6 FCC Rcd 625 (1991), aff'd mem. sub nom. California Public Broadcasting Forum v. FCC, 947 F.2d 505 (D. C. Cir. 1991); accord, Gross Telecasting, Inc., 92 FCC 2d 204, 244-245 (Rev. Bd. 1982). On the record before us, we believe that the licensee can reasonably be expected to deal truthfully with the Commission in the future and that a forfeiture is the appropriate sanction. See Character Policy Statement, 102 FCC 2d at 1188-91, 1232 (purpose of Commission's character inquiry is not to eliminate licensees from further activity in broadcasting but to make predictive judgment as to licensee's propensity to deal truthfully with Commission and to comply with rules and policies).

26. In ordering a forfeiture, we acknowledge, as the licensee has urged, that prior to an amendment enacted on October 27, 1992, the then-applicable version of Section 503(b)(6) of the Act, 47 U.S.C. §503(b)(6), which governs this case, contained a three year statute of limitations provision. (The 1992 amendment extended the statute of limitations period to cover the entire license term.) See Bloomington Twin Cities Broadcasting Corp., 11 FCC Rcd 9033 (1996). Nevertheless, a forfeiture is appropriate. The HDO in this case comprising the notice of forfeiture was released February 1, 1994, well within three years of the last evidence of violations in the licensee's September 21, 1992 pleading representing that knowledge of classical music was a job requirement at KFUO-FM. Hence, there is no statutory bar to imposition of a forfeiture based on the lack of candor in that pleading. On the other hand, the renewal applications containing the deceptive description of the licensee's EEO efforts were filed on September 29, 1989, more than three years prior to the HDO. The Board held that lack of candor in a Commission filing is a "continuing violation" which does not end until it is corrected, and that, because the truth about the licensee's misleading statement in its renewal applications was not revealed until the hearing, the forfeiture notice was issued within the three year statute of limitations. 11 FCC Rcd at 5281 ¶36. Contrary to the Board, we believe that a false or misleading statement in violation of 47 C.F.R. §73.1015 made at one point in time does not constitute a continuing violation for purposes of Section 503(b) simply because it is not corrected. That is, the violation occurred when the false or misleading statement was made. Accordingly, we will impose a forfeiture here based solely on the lack of candor finding involving the classical music requirement at KFUO-FM. Pursuant to 47 U.S.C. §503(b), each single violation of the Commission's rules may result in a forfeiture of up to $25,000. In

determining that the violation of 47 C.F.R. §73.1015 in representing to the Commission in the September 21, 1992 pleading that classical music training was a job requirement independently warrants the maximum forfeiture, we have taken into account, as described in the text, the nature, circumstances, extent, and seriousness of the violation. See 47 U.S.C. §503(b)(2)(D); see also Character Policy Statement, 102 FCC 2d at 1210-11 (Commission has broad discretion in choice of sanctions when dealing with lack of candor, and its determination will depend on the record evidence).

V. ORDERING CLAUSES

27. ACCORDINGLY, IT IS ORDERED, That the Decision of the Review Board (11 FCC Rcd 5275) IS MODIFIED to the extent indicated above, that the application for review, filed June 3, 1996, by The Lutheran Church/Missouri Synod, IS GRANTED in part and IS DENIED in all other respects, and that the application for review, filed June 3, 1996, by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP, and the St, Louis County Branch of the NAACP, and the request for oral argument, filed June 18, 1996, by the NAACP, ARE DENIED; and

28. IT IS FURTHER ORDERED, That the applications of The Lutheran Church/Missouri Synod for renewal of license of Stations KFUO(AM) and KFUO-FM ARE GRANTED effective upon adoption of this Order and subject to the EEO reporting conditions described herein.

29. IT IS FURTHER ORDERED, That the licensee submit to the Commission an original and one copy of the following information on October 1, 1997, October 1, 1998, and October 1, 1999:

(a) a list of all persons hired as well as all persons who applied for each vacancy during the twelve months preceding the respective reporting dates, indicating their referral or recruitment source, job title, part-time or full-time status, FCC Form 395-B classification, date of hire, sex and race or national origin;

(b) a list of all employees as of the most recent payroll period prior to each reporting date, by job title with part-time or full-time status indicated (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) a narrative statement detailing the Stations' efforts to recruit minorities for each position filled during the specified periods, including identification of sources used, and indicating whether any of the applicants declined actual offers of employment; and

(d) any additional information the licensee believes relevant regarding the

Stations' EEO performance and efforts.

30. IT IS FURTHER ORDERED, That pursuant to 47 U.S.C. §503(b), the Lutheran Church/Missouri Synod SHALL FORFEIT to the United States the sum of twenty five thousand dollars ($25,000) for willful violation of 47 C.F.R. §73.1015. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the Federal Communications Commission, within forty (40) days of the release date of this order, to Federal Communications Commission, P.O. Box 73482, Chicago, IL. 60673-7482.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary